experiencing some financial difficulties before Mrs Secker ceased employment. The Tribunal sought detailed financial statements from Mr and Mrs Secker. The Tribunal concluded from these, having regard to Mr and Mrs Secker's liabilities and their small income during the IMP, that they were in severe financial hardship from 17 April 1998 to 19 May 1998. Centrelink argued that the family was in financial difficulty before the IMP was imposed, and that the termination payment was expended on known and foreseeable expenses which were voluntarily undertaken. As such the requirement of s.1068B-D15(b) was not satisfied. However, the Tribunal concluded that, had the IMP not been imposed, the family would have been able to manage their debts so as not to be in severe financial hardship. They had expected that their living expenses would be met by the NSA payments, and so expended the termination payment on the various debts they had.

In determining the issue of 'reasonable foreseeability' the Tribunal was required to consider not only the family's debts and liabilities but also the imposition of the IMP itself. In this case no explanation had been given to Secker as to the effect of the IMP until after the whole of the termination payment had been expended, and thus:

> ... the imposition of [an IMP] when Mr and Mrs Secker had committed the termination payment to paying off some debts and had relied on their social security payments for daily living expenses caused them to suffer severe financial hardship ... those circumstances were not reasonably foreseeable...

Formal decision

The Tribunal set aside the decision under review. It directed that no IMP should apply, and that the termination payment received by Mrs Secker should be treated as income in the fortnight of receipt only.

[P.A.S.]

Restart Re-establishment Grant: control of the farm enterprise where writ of possession issued

ELLIOTT and SECRETARY TO THE DFaCS

(No. 2000/151)

Decided: 29 February 2000, by B.A. Barbour.

Background

The following facts were agreed:

- on 29 June 1998, the NSW Supreme Court ordered that the mortgagee bank (the bank) was entitled to a writ of possession over the farm enterprise managed by the Ercildoune partnership, which consisted of three adjoining properties;
- on 13 July 1998, the applicant applied for a Farm Family Restart Grant for the Ercildoune family property;
- by letter dated 15 July 1998, the bank declined to issue a 'Determination of qualification for farm family restart scheme certificate'. It considered the certificate would be inappropriate given that no application for continued or additional finance had recently been considered and, in any event, any such application could not be entertained;
- on 28 July 1998, a writ of possession was issued in relation to the three adjoining properties managed by the Ercildoune partnership;
- on 11 September 1998, a notice to vacate the farm was issued and the property was vacated on either 30 September or 8 October 1998;
- the farm property was sold several weeks after it was passed in at auction;
- on 30 September 1998, the claim for Farm Family Restart Scheme Grant was refused. This decision was appealed to an ARO who affirmed the decision, and Elliott then appealed to the SSAT which also affirmed the decision.

The legislation and issues

Elliott sought review of the decision of the SSAT.

The relevant legislation is contained in ss.8B and 8C of the *Farm Household Support Act 1992* (the Act) and the *Restart Re-establishment Grant Scheme* 1997 (the Scheme). The scheme provides that grants of up to $45,000 (less restart income support paid to the applicant or their partner) may be payable on the sale of farms or of rights or interests in farms. Eligibility for the Scheme is contained in clause 2.1 of the Scheme which provides that a person is only eligible to apply for a re-establishment grant if they are qualified for restart income support (under Division 1B of Part 2 of the Act). The criteria for restart income support are set out in ss.8B and 8C of the Act. In summary, s.8B provides that a person is qualified for restart income support for a period if the person has been a farmer for two years prior to the period and a certificate of inability to obtain finance for the relevant period has been issued. Section 8C provides that a person will not be qualified for restart income support if the person is not effectively in control of the farm enterprise for which the support is claimed.

The primary issue was whether the applicant was 'effectively in control' of the farm enterprise. A further issue was whether the applicant was qualified for a grant given the refusal of the mortgagee bank to issue a certificate of inability to obtain finance.

Applicant's argument

The applicant disputed that he had lost control of the farm for the purposes of the Scheme when the NSW Supreme Court ordered that the bank was entitled to possession of the property because, in his submission, from the date of the order, the bank had the right, if it chose to do so, to enforce the order by issuing a writ of possession, and by then executing the writ and taking possession. The applicant submitted that at any time until a sale by the bank took place, he retained his equity of redemption and could have re-financed the debt and redeemed the mortgage. On this view, he remained in possession and control of the property until 11 September 1998 when the notice to vacate the farm was issued. He continued to farm the property and trade on the land until 8 October 1998 when he and his family moved out. The bank had agreed that the property need not be vacated until that date. The applicant noted the property was not sold by the bank until 2-3 weeks after it failed to sell at an auction arranged by the bank on 5 November 1998.

The applicant pointed out that the Act empowers the Minister to 'formulate a scheme for the provision of payments to be made ... on the sale of farm enterprises, or rights or interests in the farm

enterprises'. In the applicant's submission, farming land is a fundamental ingredient of a farm enterprise independent of ownership of the land and therefore the enterprise is the farming business carried on by the farmer.

The applicant submitted that the sale was on commercial terms and at arm's length since it was sold privately after being passed in at auction. The applicant also submitted that he could have retained the farm plant and machinery and moved it to another property and thereby, could have continued to carry on the farming enterprise. The applicant submitted that the purpose of the Scheme was to encourage unsuccessful farmers to leave agriculture and that it was clear that, due to his accumulated financial problems, he was an unsuccessful farmer and therefore a person to whom the policy of the Scheme was directed.

Respondent's argument

The respondent submitted that the applicant did not fulfill the requirements of s.8B because the bank refused to complete the required certificate due to the indebtedness of the applicant's partnership. Further, the respondent submitted the applicant was not effectively in control of the farm enterprise because, as contemplated by the note to s.8C, a mortgagee had taken possession of his farm and this constituted a loss of control despite the fact that the bank did not exercise its rights until a later date. The respondent submitted that even if the applicant had applied to re-finance the loan over the farm, such application would have been refused due to the indebtedness of the partnership with which Elliott was involved in relation to an earlier loan (the debt to the bank was $2.3 million). The respondent contended that another financial institution/person would not have agreed to re-finance the bank's first mortgage in these circumstances.

In the respondent's submission, legal possession and physical possession are different so that even though the applicant was allowed to farm the property until he vacated it on 11 September 1998, in effect he was farming the property on the bank's behalf with any benefit from his farming accruing to the bank.

The respondent did not agree with the applicant's contention that the land could be separated from the farming enterprise per se. Legal possession vested in the bank as at the date of the writ and accordingly, all proceeds from the auction were the property of the bank. The applicant had been unable to obtain the certificate from the bank required by s.8B.

Tribunal's findings

The Tribunal found that the applicant failed to satisfy s.8B because the bank refused to issue the necessary certificate. The Tribunal also found that the applicant was not in control of the farming enterprise following the issue of a writ of possession in favour of the bank by the Supreme Court. The writ entitled the bank to take possession of the property and sell it to offset the mortgage debt which had accrued to it. This conclusion was supported by the note to the section which specifically contemplates that effective control of a farm enterprise ceases when a mortgagee takes possession of the farm. Although the bank consented to the applicant remaining on the land after the writ of possession was issued, the bank was clearly 'effectively in control' of the farming enterprise and the bank's control is not negated by the applicant's physical possession and continued farming of the land. The Tribunal noted this view was consistent with Centrelink guidelines which, following *Drake and Minister for Immigration and Ethnic Affairs No 2* (1979) 2 ALD 634, could be taken into account because the guidelines were consistent with the legislation and do not unduly restrict the discretion of the decision maker.

The Tribunal also noted that the letter from the bank dated 15 July 1998, refusing the certificate sought by the applicant, concluded that, while no application for continued or additional finance had been made, any such application could not be entertained given the debt to the bank of $2.3 million.

In the Tribunal's view, control of farming land cannot be separated from control of the farming enterprise. Unless the relevant land was under the applicant's control the farming enterprise would have no purpose and could not function.

The Tribunal noted that one of the purposes of the Scheme is to provide an incentive for unsuccessful eligible farmers to leave farming; clearly there is no need for the government to provide such an incentive where the farmer has already effectively lost control of the farm property.

Formal decision

The AAT affirmed the decision under review.

[S.L.]

Federal Court

Family allowance: treatment of maintenance income

KING v SECRETARY TO THE DFaCS

(Federal Court of Australia)

Decided: 16 February 2000 by French J.

King appealed to the Federal Court against a decision of the AAT that the maintenance payments she received from time to time were to be annualised.

The facts

King had three children and received sporadic maintenance payments from her ex-husband. In April 1998 she received a maintenance payment of $1032 via the Child Support Agency. The money was collected in April to be paid to King before the seventh day of the following month and thus debited to May. On the basis of the maintenance payment received by King on 6 May 1998, Centrelink reduced family allowance payable to King for the fortnights commencing 7 May 1998 and 21 May 1998. Centrelink converted the rate of maintenance paid to King to an annual rate of $12,003.84.

The SSAT decision

The SSAT decided that the annual rate of maintenance received by King was the actual maintenance she had received over the year of $1435.

The AAT decision

The AAT set aside the SSAT decision and decided that the annual rate of income in May 1998 was $12,003.84.